

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

# MIYOKO'S KITCHEN,

*Plaintiff,*

V.

KAREN ROSS, in her official capacity as Secretary of the California Department of Food and Agriculture, and STEPHEN BEAM, in his official capacity as Branch Chief of the Milk and Dairy Food Safety Branch,

### *Defendants.*

Case No. 3:20-cv-00893-RS

**DECLARATION OF MICHELE  
SIMON IN SUPPORT OF  
MOTION FOR PRELIMINARY  
INJUNCTION AND IN  
OPPOSITION TO DEFENDANTS'  
MOTION TO DISMISS**

I, Michele Simon, declare as follows:

1. I am the executive director of the Plant Based Foods Association (PBFA). I offer this declaration to help the court understand the impact of recent actions taken by the California Department of Food and Agriculture on producers and sellers of plant-based foods like Miyoko's.

2. The Plant Based Foods Association (PBFA) is a trade association that represents the leading manufacturers and sellers of 100% plant-based foods. We were founded in 2016 to build a strong foundation for the plant-based foods industry to succeed and thrive. I have been the executive director of PBFA since its inception when I founded the organization with the five founding board members. Before that, I was a successful public health attorney, food policy expert, and author. I helped start PBFA because I saw the need for innovative food companies to have a collective voice in the policy arena and marketplace.

3. PBFA has more than 300 company, affiliate, and investor members who represent the unified voice of the plant-based foods industry. Of our 175 company-members, at least 56 manufacture and sell plant-based dairy alternatives such as plant-

based cheese, ice cream, butter, and yogurt. At least 13 of those companies are based in California, including Miyoko's Kitchen.

4. PBFA regularly engages at the state and federal level to assist lawmakers understand the policies that affect the plant-based industry, and advocate for the interests of its members. PBFA is actively engaged in fighting on the federal and state level to defend its members' First Amendment right to common-sense labeling. We have worked hard to develop and maintain positive and constructive relationships with policymakers and officials at FDA and in states around the nation. Our aim to for our industry to operate on a level playing field.

5. PBFA also developed comprehensive voluntary standards for the labeling of plant-based dairy alternatives such as plant-based milk and yogurt. These standards provide guidance to our industry members about how to label such products in a way that is consistent and clear for consumers. PBFA recommends that companies use qualifying language like "vegan," "plant-based," or "dairy-free" when they use terms like "milk," "yogurt," "butter," and "cheese." As far as I know, all our members that sell plant-based alternatives in California use such qualifying language—including Miyoko's. PBFA's goal is to promote clarity and consistency in the labeling of plant-based foods.

6. Over the past several years, as consumer demand and awareness has grown, the plant-based food industry has expanded exponentially. Retail sales of plant-based foods have skyrocketed in recent years, growing 11% just last year and 31% since early 2017.<sup>1</sup> Among the “leading drivers of plant-based sales” are plant-based milks and dairy alternatives, which are expected to reach \$40 billion in annual sales by 2025.<sup>2</sup> At the same

<sup>1</sup> Plant Based Foods Ass'n, U.S. Plant-Based Retail Market Worth \$4.5 Billion, Growing at 5x Total Food Sales, (July 12, 2019), <https://plantbasedfoods.org/2019-data-plant-based-market/>.

<sup>2</sup> *Id.*; see Edlong, *Connecting with Consumers in Plant-based Dairy*, Food Dive (Nov. 19, 2019), <https://www.fooddive.com/spons/connecting-with-consumers-in-plant-based-dairy/567437/>; Brian Kateman, *Plant-Based Butter Is Taking Over The Dairy Aisle*, Forbes (Apr. 28, 2020), <https://www.forbes.com/sites/briankateman/2020/04/28/plant-based-butter-is-taking-over-the-dairy-aisle/#2d18581b7377>.

1 time that the sales of plant-based dairy alternatives are booming, however, sales of  
2 traditional animal-dairy products have been decreasing.<sup>3</sup>

3 7. Many of PBFA's members sell (or plan to sell) their plant-based dairy  
4 alternatives within the state of California, and many of them have production facilities  
5 within the state.

6 8. In early December 2019, I became aware of a letter sent by the Milk and  
7 Dairy Food Safety Branch to Miyoko's. I read the letter, which forbade Miyoko's from  
8 using specific words, phrases, and images. The letter noted that Miyoko's labels and  
9 website were illegal—and instructed Miyoko's to remove the word "butter" in the phrase  
10 "cultured vegan butter," stop using the phrase "100% cruelty and animal free," and  
11 remove an image of a "woman hugging a cow."

12 9. Unfortunately, this letter did not altogether come as a surprise to me. For  
13 the past few years PBFA members have been reaching out to me after receiving similar  
14 letters. Members look to me for guidance in my role as executive director of PBFA, and  
15 thanks to my knowledge of laws and regulations. I am therefore aware of several other  
16 companies that have received similar enforcement letters from the Milk and Dairy Food  
17 Safety Branch. These letters prohibit companies from using clear and non-misleading  
18 terms like "almondmilk yogurt," "vegan cheese" and the like.

19 10. PBFA's members have been forced to operate with a constant fear of  
20 enforcement and in an environment of legal uncertainty. The PBFA members I have  
21 spoken to who have received these letters are afraid of losing necessary licenses, being  
22 fined, or worse. One member petitioned for the Milk and Dairy Food Safety Branch to

24 <sup>3</sup> CISION PR Web, *Plant Based Foods Sales Experience 8.1 Percent Growth Over Past Year*, (Sept. 13, 2017),  
25 <http://www.prweb.com/releases/2017/09/prweb14683840.htm> (observing that "[t]he plant-based milk category is up 3.1  
26 percent since last year" but "[o]ver the same period, according to the Nielsen data, cow's milk sales are down about 5  
percent"); see also Giuliana D'Esopo, *Don't Cry over Plant-Based Milk: Why the Use of the Term "Milk" on Non-Dairy  
27 Beverages Does Not Constitute "Misbranded" Under the Federal Food, Drug, and Cosmetic Act*, 14 J. Health &  
Biomedical L. 481, 498 (2018) (noting that "[t]he dairy industry remains under pressure as the global non-dairy milk  
market reached \$5.8 billion in 2014 and is predicted to reach \$10.9 billion by 2019").

1 adopt temporary standards so that it would not have to change its labels, but this petition  
2 was denied.

3       11. The aggressive enforcement posture of the Milk and Dairy Food Safety  
4 Branch has been an ongoing topic of conversation at PBFA board meetings, meetings with  
5 individual members, and even in PBFA's policy work. It's no secret that the Milk and  
6 Dairy Food Safety Branch has been targeting PBFA members in the state of California  
7 after the National Milk Producers Federation began writing letters complaining to the  
8 Branch about animal-based dairy's plant-based competitors.

9       12. I have no clear answers for companies who have received these types of  
10 letters and threats from the Milk and Dairy Food Safety Branch. All I can tell them is that  
11 the Milk and Dairy Food Safety Branch has the authority to revoke or withdraw necessary  
12 licenses, impose civil and criminal penalties, and even pull their products from  
13 supermarket shelves. Under the circumstances, even companies that have not received  
14 enforcement letters themselves would be reasonable in rethinking their own marketing  
15 and packaging practices based on seeing what happened to Miyoko's. It is also reasonable  
16 to expect that, in response, companies will make changes or refrain from making changes  
17 to their labels after seeing what happened to Miyoko's. There is no way for any plant-  
18 based producer to rest assured that the Milk and Dairy Food Safety Branch's enforcement  
19 position will not apply to them too.

20       13. Being able to use commonly understood terms like "vegan butter" and  
21 "almondmilk" is essential for the success of PBFA members. It ensures consumers  
22 understand what products will taste like, their consistency, and how they can be used.  
23 But it is reasonable to expect that the Milk and Dairy Food Safety Branch's enforcement  
24 actions will chill the speech of PBFA's members—causing them to reasonably feel a need  
25 to choose between being able to truthfully convey what their products are to consumers  
26 and facing severe enforcement action by the State of California.

14. We also don't know how many companies may not be moving forward with their plans to start a new company due to the fear that the State of California is instilling in this industry.

15. In short, the Branch's enforcement letters have made operating a successful plant-based food business much more difficult within the state.

16. I have personal knowledge of the facts set forth in this declaration and could and would testify to those facts if called as a witness.

17. I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

5/25/2020

Executed this \_\_\_\_ day of May, 2020

DocuSigned by:  
*Michele Simon*  
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Michele Simon